LIBRARY
SUPREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 522

JULIUS RANNY RAGAN, PETITIONER,

VS.

MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC., A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DANIEL L. BRENNER,
Counsel for Petitioner.

ROACH, BRENNER & WIMMELL,
of Kansas City, Missouri,
Of Counsel.

INDEX

Petition for Writ of Certiorari

Summary Statement of the Matter Involved 2
Statement of Basis on Which the Jurisdiction of This Court Is Invoked 4
The Questions Presented 4
Reasons Relied Upon for Allowance of Writ 5

Brief in Support of Petition for Writ of Certiorari

I. Opinions in the Court Below 10

II. Statement of Basis on Which the Jurisdiction of the Court Is Invoked 10

III. Statement of the Case 10

IV. Specification of Errors Intended to Be Urged 11

V. Argument—

Point A. In applying the law of Kansas rather than the Federal Rules of Civil Procedure in order to determine when an action was commenced in Federal District Court, the Court of Appeals for the Tenth Circuit has decided an important and substantial question of Federal law which has not been, but should be, settled by the United States Supreme Court 11

Point B. The decision of the Court of Appeals for the Tenth Circuit in Petitioner's case is believed to be in conflict with the decisions of the United States Supreme Court and is in direct conflict with its own prior decisions, the decisions of other Courts of Appeals, the decisions of other Federal Courts, and the decisions of State Supreme Courts 14

Point C. The Federal Rules of Civil Procedure have the force and effect of Federal statutes and may be neither abrogated nor diminished by State law 21

Point D. The Kansas statute as to commencement of actions is not an integral part of the Kansas Statute of Limitations 27

(1) The interpretation of the Kansas statutes by the Kansas Supreme Court 28

(2) The interpretation of similar statutes of the states 32

Point E. The decision unwarrantedly and improperly extends the United States Supreme Court decision of Guaranty Trust Company vs. York, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 39

Conclusion 43

TABLE OF CASES

Allis-Chalmers Mfg. Co. vs. Lewelling, 141 Kan. 350, 41 Pac. 2d 1032 ..... 8, 29

Alley vs. Federal National Bank of Shawnee, 124 F. 2d 995, 998 ..... 7, 24

Bannister vs. Carroll, 43 Kan. 64, 22 Pac. 1012 ..... 8, 29

Bomar vs. Keyes, 162 F. 2d 136 ..... 5, 6, 7, 9, 16, 31, 33, 41

Bond vs. Penn. R. R. Co., 124 Minn. 195, 144 N. W. 942 ..... 6, 8, 20, 35

Collins vs. Manville, 170 Ill. 614, 48 N. E. 914 ..... 6, 7, 20, 34

Commercial National Bank vs. Tucker, 123 Kan. 214, 254 Pac, 1034 ..... 8, 29

Dunlap vs. McFarland, 25 Kan. 488, ... Pac. 8, 28, 30

Erie R. Co. vs. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 ..... 9, 40
Gallagher vs. Carroll, 27 F. Supp. 568 ..... 6, 7, 18, 34
Goldenberg vs. Murphy, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686 ..... 6, 7, 20, 33
Guaranty Trust Co. vs. York, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 ..... 8, 20, 39
Guaranty Trust Co. vs. York, 143 F. 2d 503, 521 ..... 9, 40
Hackner vs. Guaranty Trust Co., 117 F. 2d 95, 99, n. 1 ..... 5, 6, 9, 20, 42
H F G Co. vs. Pioneer Pub. Co., 162 F. 2d 536, 539 ..... 7, 25
Hicks vs. Bekins Moving and Storage Co., 115 F. 2d 406 ..... 7, 19
Isaacks vs. Jeffers, 144 F. 2d 26, certiorari denied 323 U. S. 781, 65 S. Ct. 270, 89 L. Ed. 624 ..... 5, 6, 14, 20
Krisor vs. Watts, 61 F. Supp. 845 ..... 5, 6, 7, 9, 18, 36, 42
McGrier vs. P. Ballantine and Sons, 44 F. Supp. 762 ..... 6, 20
Meredith vs. City of Winter Harbor, 320 U. S. 228, 64 S. Ct. 7, 88 L. Ed. 9 ..... 7, 38
Railway Co. vs. Bagley, 65 Kan. 188, 69 Pac. 189 ..... 8, 30
Reynolds vs. Needle, 132 F. 2d 161 ..... 5, 6, 20, 42
Robinson vs. Waterman S. S. Co., 7 F. R. D. 51 ..... 6, 20
Sibbach vs. Wilson, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479 ..... 5, 7, 9, 12, 22, 42
Taylor vs. Swift and Co., 114 Kan. 431, 219 Pac. 516 ..... 8, 30
Vann vs. Missouri, K. and T. R. Co., 110 Kan. 799, 205 Pac. 607 ..... 8, 29
Westland Oil Co. vs. Firestone Tire and Rubber Co., 3 F. R. D. 55 ..... 7, 26
Williams vs. Powers, 135 F. 2d 153, 156 ..... 7, 24
Yudin vs. Carroll, 57 F. Supp. 793 ..... 7, 31

STATUTES AND RULES CITED

Rules 3 and 4 (a), Federal Rules of Civil Procedure, 28 U. S. C. A. foll. Sec. 723c 6, 7, 12, 21, 22

Act of June 19, 1934, Ch. 651, 48 Stat. 1064, 28 U. S. C., Secs. 723b, 723c 7, 21

Secs. 60-301, 60-306, 60-308, G. S. Kan., 1935 8, 20, 27

Article 2, New York Civil Practice Act 8, 32

Sections 541.12, 541.17, Revised Laws of Minnesota, 1905 8, 35

Section 330.19 Wisconsin Statutes, 1943 8, 37

Ilsen, "Recent Developments in Federal Practice," Federal Rules of Civil Procedure, West Publishing Co., 1947 Rev. Ed., pp. 320, 321 8, 9, 37, 41

"Conformity Act," 28 U. S. C. A., Sec. 724 9, 43

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. .....

JULIUS RANNY RAGAN, PETITIONER,

VS.

MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC., A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Julius Ranny Ragan, respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Tenth Circuit to review a judgment of that Court entered November 9, 1948 (R. 41-51, not yet reported),* reversing a judgment of the United States

*Petition for rehearing denied December 17, 1948.

District Court for the District of Kansas, wherein your Petitioner was plaintiff, and ordering that defendant's motion for summary judgment be sustained. A certified transcript of the record in this case, including the proceedings in said United States Court of Appeals for the Tenth Circuit, is furnished herewith in accordance with Rule 38 of the rules of this Court.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Julius Ranny Ragan, hereinafter referred to as Petitioner, was injured in an automobile collision on October 1, 1943 (R. 2, 42). The vehicle with which he collided was operated by a servant of Respondent, Merchants Transfer & Warehouse Company, Inc. (R. 2).

The petition (R. 1-4) was filed in the United States District Court on September 4, 1945.

The original summons was issued September 7, 1945 (R. 4-5), and return on service showed service on Respondent on September 22, 1945 (R. 5). On October 12, 1945, Respondent moved to quash service of the original summons (R. 5-6).

The return of service of the original summons was quashed (R. 17).

Alias summons issued December 28, 1945, and was served on that date (R. 6-7). Respondent's motion to quash the service of the alias summons was overruled (R. 17). Respondent thereupon filed its answer (R. 18-21) and pleaded the two-year Statute of Limitations of the State of Kansas, this being the third subparagraph of Sec. 60-306, G. S. of Kan., 1935, and also Sec. 60-308, G. S. of Kan.,

---

Infra, p. 27.

1935,[2] which provides that an action shall be deemed commenced at the date of service of the summons, and that an attempt to commence an action shall be deemed to be equivalent to the commencement thereof when the party diligently endeavors to procure service, but that such attempt must be followed by service within sixty days (R. 49).

Thereupon, Petitioner moved to strike from the answer the plea of the Statute of Limitations (R. 24), and Respondent moved for summary judgment (R. 23). By memorandum opinion (R. 24-28), the District Court sustained the motion of Petitioner, and overruled the motion of Respondent.

Trial was had to the jury; resulting in verdict and judgment for the plaintiff in the sum of $13,425.00 and costs (R. 32).

Respondent filed notice of appeal on January 26, 1948 (R. 36), and the cause was heard by the United States Court of Appeals for the Tenth Circuit. On November 9, 1948, the judgment of the District Court was reversed, and the cause remanded, with directions to sustain Respondent's motion for summary judgment (R. 41-51).

On December 6, 1948, Petitioner filed its petition for rehearing (R. 51-53), and on December 17, 1948, the petition was denied (R. 53). On December 27, 1948, upon motion of Petitioner to stay the mandate, the said Court of Appeals entered an order staying the issuance of the mandate for a period of thirty (30) days from and after that date (R. 53).

---

[2] *Infra*, p. 27.

STATEMENT OF BASIS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(a) Statutory Provisions Sustaining Jurisdiction.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of June 7, 1934, Chapter 426, 49 Stat. 926 (28 U. S. C. A. 347a).

(b) The Date of the Judgment Sought to be Reviewed.

The judgment of the Court of Appeals reversing the judgment of the District Court was entered December 6, 1948 (R. 51), and Petitioner's petition for rehearing was denied on December 17, 1948 (R. 53). This petition for writ of certiorari and supporting certified transcript of the record were filed in this Court within three (3) months from December 17, 1948.

THE QUESTIONS PRESENTED.

I.

Was Petitioner's action commenced within two years from the date of Petitioner's injury, so as to avoid the bar of the Kansas Statute of Limitations?

II.

Did the Court of Appeals for the Tenth Circuit decide an important and substantial question of Federal law which has not been, but should be, settled by the United States Supreme Court?

III.

Was it proper for the Court of Appeals to apply the law of Kansas to determine the date of commencing this action in the Federal District Court?

A. Is this not contrary to the law of Kansas?

B. Is not such decision in direct conflict with its own prior decisions and the decisions of other Federal courts?

C. Does not such decision violate the statute law of the United States, in view of the fact that the Federal Rules of Civil Procedure have the force and effect of statute?

IV.

Does this decision constitute an unwarranted and highly improper extension of the case of *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

1. The Court of Appeals for the Tenth Circuit has determined that the law of the State of Kansas as to commencement of actions is to be applied in an action in Federal District Court to determine if the action was commenced within the time allowed by the applicable Kansas Statute of Limitations. In so doing, said Court has decided an important and substantial question of Federal law which has not been, but should be, settled by the United States Supreme Court.

Sibbach v. *Wilson*, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479.

Bomar v. *Keyes*, 162 F. 2d 136.

Isaacks v. *Jeffers*, 144 F. 2d 26, certiorari denied 323 U. S. 781, 65 S. Ct. 270, 89 L. Ed. 624.

Reynolds v. *Needle*, 132 F. 2d 161.

Hackner v. *Guaranty Trust Co.*, 117 F. 2d 95, 99, n. 1.

Krisor v. *Watts*, 61 F. Supp. 845.

McGrier v. *P. Ballantine and Sons*, 44 F. Supp. 762.

Gallagher v. *Carroll*, 27 F. Supp. 568.

Robinson v. *Waterman S. S. Co.*, 7 F. R. D. 51.

Rules 3 and 4 (a), Federal Rules of Civil Procedure, 28 U. S. C. A. foll. Sec. 723c.

2. By refusing to apply the Federal Rules of Civil Procedure to determine the date an action was commenced in Federal District Court, the Court of Appeals for the Tenth Circuit has rendered a decision in conflict with its own prior decisions, the decisions of other Courts of Appeals, and the decisions of State Supreme Courts.

Goldenberg v. *Murphy*, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686.

Bomar v. *Keyes*, 162 F. 2d 136.

Isaacks v. *Jeffers*, 144 F. 2d 26, certiorari denied 323 U. S. 781, 65 S. Ct. 270, 89 L. Ed. 624.

Reynolds v. *Needle*, 132 F. 2d 161.

Hackner v. *Guaranty Trust Co.*, 117 F. 2d 95, 99, n. 1.

Krisor v. *Watts*, 61 F. Supp. 845.

McGrier v. *P. Ballantine and Sons*, 44 F. Supp. 762.

Gallagher v. *Carroll*, 27 F. Supp. 568.

Robinson v. *Waterman S. S. Co.*, 7 F. R. D. 51.

Collins v. *Manville*, 170 Ill. 614, 48 N. E. 914.

Bond v. *Penn. R. R. Co.*, 124 Minn. 195, 144 N. W. 942.

3. Since the Federal Rules of Civil Procedure have the force and effect of statutes, the Court of Appeals for the Tenth Circuit has violated the statute laws of the United States by applying the law of the State of Kansas to determine the date an action was commenced in Federal District Court. In so doing, the Court has decided a Federal question of substance in a way probably not in

accord with the decisions of the United States Supreme Court, and has reached a decision in conflict with its own prior decisions and the decisions of other Courts of Appeals.

Sibbach v. *Wilson*, 312 U. S. 1, 15, n. 18, 61 S. Ct. 422, 85 L. Ed. 479, 486.

H F G Co. v. *Pioneer Pub. Co.*, 162 F. 2d 536, 539.

Williams v. *Powers*, 135 F. 2d 153, 156.

Alley v. *Federal National Bank of Shawnee*, 124 F. 2d 995, 998.

Hicks v. *Bekins Moving and Storage Co.*, 115 F. 2d 406.

Krisor v. *Watts*, 61 F. Supp. 845.

Westland Oil Co. v. *Firestone Tire and Rubber Co.*, 3 F. R. D. 55.

Rules 3 and 4 (a), Federal Rules of Civil Procedure, 28 U. S. C. A. foll. Sec. 723c.

Act of June 19, 1934, Ch. 651, 48 Stat. 1064, 28 U. S. C., Secs. 723b, 723c.

4. In holding that the Kansas statute as to commencement of actions (Sec. 60-308, G. S. Kan., 1935) was an integral part of the Kansas Statute of Limitations (Sec. 60-306, G. S. Kan., 1935), the Court of Appeals for the Tenth Circuit has decided an important question of Kansas law probably in conflict with the law of the State of Kansas.

Meredith v. *City of Winter Harbor*, 320 U. S. 228, 64 S. Ct. 7, 88 L. Ed. 9.

Goldenberg v. *Murphy*, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686.

Bomar v. *Keyes*, 162 F. 2d 136.

Yudin v. *Carroll*, 57 F. Supp. 793.

Krisor v. *Watts*, 61 F. Supp. 845.

Gallagher v. *Carroll*, 27 F. Supp. 568.

Collins v. *Manville*, 170 Ill. 614, 48 N. E. 914.

Allis-Chalmers Mfg. Co. v. *Lewelling*, 141 Kan. 350, 41 Pac. 2d 1032.

Commercial National Bank v. *Tucker*, 123 Kan. 214, 254 Pac. 1034.

Taylor v. *Swift and Co.*, 114 Kan. 431, 219 Pac. 516.

Vann v. *Missouri, K. and T. R. Co.*, 110 Kan. 799, 205 Pac. 607.

Railway Co. v. *Bagley*, 65 Kan. 188, 69 Pac. 189.

Bannister v. *Carroll*, 43 Kan. 64, 22 Pac. 1012.

Dunlap v. *McFarland*, 25 Kan. 488, Pac.

Bond v. *Penn. R. R. Co.*, 124 Minn. 195, 144 N. W. 942.

Secs. 60-301, 60-306, 60-308, G. S. Kan., 1935.

Article 2, New York Civil Practice Act.

Sections 541.12, 541:17, Revised Laws of Minnesota, 1905.

Section 330.19 Wisconsin Statutes, 1943.

Ilsen, "Recent Developments in Federal Practice," Federal Rules of Civil Procedure, West Publishing Co., 1947 Rev. Ed., pp. 320, 321.

5. The Court of Appeals for the Tenth Circuit has held that where Federal jurisdiction is based on diversity of citizenship, the result in a Federal District Court must be identical with the result which would have been reached had the action been brought in the State court. Such holding gives an unwarranted and improper effect to a decision of this Court; decides an important Federal question in a way probably in conflict with applicable decisions of this Court; and renders a decision in conflict with its own prior decisions and the decisions of other Courts of Appeals.

Guaranty Trust Co. v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079.

Sibbach v. *Wilson*, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479.

Erie R. Co. v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

Bomar v. *Keyes*, 162 F. 2d 136.

Guaranty Trust Co. v. *York*, 143 F. 2d 503, 521.

Hackner v. *Guaranty Trust Co.*, 179 F. 2d 95.

Krisor v. *Watts*, 61 F. Supp. 845.

"Conformity Act," 28 U. S. C. A., Sec. 724.

Ilsen, "Recent Developments in Federal Practice," Federal Rules of Civil Procedure, West Publishing Co., 1947 Rev. Ed., p. 320.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals for the Tenth Circuit in the case entited "Merchants Transfer & Warehouse Company, Inc., a corporation, Appellant, vs. Julius Ranny Ragan, Appellee," Docket No. 3657, to the end that this cause may be reviewed; and that the petitioner be granted such other and further relief in the premises as to the Court may seem appropriate and proper.

Julius Ranny Ragan,
(Petitioner).

By

DANIEL L. BRENNER,
Counsel for Petitioner.

ROACH, BRENNER & WIMMELL,
of Kansas City, Missouri,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS IN THE COURT BELOW.

The memorandum opinion of the District Court appears in full in the record (R. 24-28).

The opinion of the Court of Appeals for the Tenth Circuit,) F. 2d , appears in full in the record (R. 41-51).

II.

STATEMENT OF BASIS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of June 7, 1934, Chapter 426, 48 Stat. 926 (28 U. S. C. A. 347*a*).

III.

STATEMENT OF THE CASE.

Petitioner has stated the case in "Summary Statement of the Matter Involved" in the foregoing petition for writ of certiorari, which is hereby adopted and made a part of the brief.

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

1. The Court of Appeals erred in applying the law of Kansas in order to determine whether an action was commenced in Federal District Court so as to toll the Kansas Statute of Limitations.

2. The Court of Appeals erred in failing to recognize that the Federal Rules of Civil Procedure have the force and effect of a Federal statute.

3. The Court of Appeals erred in holding that the Kansas statute as to commencement of actions was an integral part of the Kansas Statute of Limitations.

4. The Court of Appeals erred in holding that the decision of the Federal District Court for the District of Kansas must be the same as would have been reached in the Kansas courts.

V.

ARGUMENT.

POINT A.

In applying the law of Kansas rather than the Federal Rules of Civil Procedure in order to determine when an action was commenced in Federal District Court, the Court of Appeals for the Tenth Circuit has decided an important and substantial question of Federal law which has not been, but should be, settled by the United States Supreme Court.

Every plaintiff who institutes an action in a Federal District Court is confronted with the necessity of commencing his action within the time allowed by the applicable Statute of Limitations.

After the enactment of the Federal Rules of Civil Procedure, including Rules as to commencement of actions (Rules 3 and 4(a), 28 U. S. C. A. foll. Sec. 723c, R. 47), plaintiffs in Federal District Courts in diversity cases have properly felt that a compliance with those Rules was sufficient to toll the applicable State Statute of Limitations.

The Advisory Committee, in its Notes appended to the proposed Rules, expressed a *caveat* in Note 4 to Rule 3 of the Rules (28 U. S. C. A. foll. Sec. 723c):

> "4. This rule provides that the first step in an action is the filing of the complaint. Under Rule 4(a) this is to be followed forthwith by issuance of a summons and its delivery to an officer for service. Other rules providing for dismissal for failure to prosecute suggest a method available to attack unreasonable delay in prosecuting an action after it has been commenced. When a federal or state statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations. The requirement of Rule 4(a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising."

Any doubt created by this *caveat* was thought allayed by the adoption of the Rules by the Supreme Court and the approval thereof by the Congress of the United States. Especially so, when this approval was followed by the holding in *Sibbach* v. *Wilson*, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479, that the Federal Rules of Civil Procedure had

the force and effect of statutes of the United States. It is interesting to note that *certiorari* was granted in that case because of the importance of the question presented.

On the many occasions when the precise question here involved has been presented to the Federal courts, they have universally held that a compliance with the Federal Rules as to commencement of an action was sufficient to toll the state Statute of Limitations.[1]

The decision in Petitioner's case, if allowed to stand, will cast great confusion on the propriety of complying with the Federal Rules as to commencement of actions. If a slight difference in the wording of state statutes as to commencement of actions is to determine whether they must be complied with in order to toll a Statute of Limitations, then a litigant must always comply with the state method in order to be sure he has "commenced his action" for that purpose. And this returns us to the Conformity Act, thought relegated to limbo.

Petitioner submits that a most important question of federal law, not previously decided by this Court, and one which may affect every litigant in diversity cases in Federal Courts, is here presented. The very frequency with which the question has been presented to the lower Federal Courts, is proof of its importance.

Petitioner urges the Court that it should now accept and decide this most important question of Federal law, which has not heretofore been decided by this Court.

---

[1] *Bomar* v. *Keyes*, 162 F. 2d 136; *Isaacks* v. *Jeffers*, 144 F. 2d 36, *certiorari* denied, 323 U. S. 781, 65 S. Ct. 270, 89 L. Ed. 624; *Reynolds* v. *Needle*, 132 F. 2d 161; *Hackner* v. *Guaranty Trust Co.*, 117 F. 2d 95, 99, n. 1; *Krisor* v. *Watts*, 61 F. Supp. 845; *United States* v. *Spreckels*, 50 F. Supp. 789; *McGrier* v. *P. Ballantine and Sons*, 44 F. Supp. 762; *Gallagher* v. *Carroll*, 27 F. Supp. 568; *Robinson* v. *Waterman S. S. Co.*, 7 F. R. D. 51.

POINT B.

The decision of the Court of Appeals for the Tenth Circuit in Petitioner's case is believed to be in conflict with the decisions of the United States Supreme Court and is in direct conflict with its own prior decisions, the decisions of other Courts of Appeals, the decisions of other Federal Courts, and the decisions of State Supreme Courts.

The case of *Isaacks* v. *Jeffers*, 144 F. 2d 26 (C. C. A. 10, 1944), *certiorari* denied 323 U. S. 781, 65 S. Ct. 270, 89 L. Ed. 624, was decided by this same Court of Appeals for the Tenth Circuit. The question involved was identical. An action was commenced in the United States District Court for the District of New Mexico. The basis of the court's jurisdiction was diversity of citizenship. Defendant entered a plea of the Statute of Limitations, charging that, under New Mexico law, the action was not commenced within the period of the New Mexico Statute of Limitations. It was held, l. c. 28:

> "(1) The law of New Mexico controls as to the time within which an action must be commenced. However, the manner in which actions are commenced, when actions are deemed to have begun, the manner and method of serving process, all relate to procedure and are governed by the law of the forum in which the action is instituted. *Collins* v. *Manville*, 170 Ill. 614, 48 N. E. 914, 915, involved an action which arose in New York but was brought in the state courts of Illinois. The case involved the New York statute of limitations and also the question whether it had been filed in Illinois before the expiration of the New York statute of limitations. The Illinois court said:
>
> > 'The form and mode of procedure must be according to the rules of this state. If it were a question of when an action had been commenced in the state of New York, the laws of that state

would govern, but the question here is when was the action commenced in this state, and as to that our laws must control.'

"*Bond* v. *Pennsylvania R. Co.*, 124 Minn. 195, 144 N. W. 942, 943, concerns an action for wrongful death in Pennsylvania. The action was brought in Minnesota. The opinion of the Minnesota court states:

'* * * But the means by which our courts acquire jurisdiction, and the time at which the action is deemed as commenced, and all other matters pertaining to the procedure and to the remedy are determined and governed exclusively by our own statutes.'

"In *Goldenberg* v. *Murphy*, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686, the Supreme Court held that when a suit was brought in the state court, the laws of that state will control in interpreting the provisions of a federal statute of limitations as to what constitutes the commencement of a suit.

"Prior to the adoption of the Rules of Civil Procedure for the district courts of the United States, an action in a federal court of equity was deemed to have been commenced so as to interrupt the running of the statute of limitations by the filing of a complaint with a *bona fide* intent to prosecute the suit diligently, provided there was no unreasonable delay in the issuance or the service of the summons.

"(2) We are of the opinion that since the adoption of the Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723c, we must now look to Rules 3 and 4 to determine when the action was commenced. Rule 3 provides that a 'civil action is commenced by filing a complaint with the court.' Rule 4 provides that: 'Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff sep-

arate or additional summons shall issue against any defendants.' Under these rules we think the action was commenced and the running of the statute interrupted by the filing of the complaint, although the process was not actually served until slightly more than sixty days after the expiration of four years from the accrual of the action.

"(3) The conduct of a plaintiff subsequent to the filing of a complaint might be such as would constitute an abandonment of the action. That situation is, however, not present here. There is nothing in the record from which a legal conclusion of lack of good faith in the prosecution of the action or abandonment thereof can be inferred. Failure of the plaintiff to procure service of summons for slightly more than sixty days after the expiration of the period of limitations does not in itself constitute lack of due diligence or show abandonment of the cause of action. The trial court evidently failed to find such conduct, because it concluded that the statute of limitations was no bar to the prosecution of the action."

This decision, unless there is some justifiable basis for a distinction of the instant case, constitutes a square holding of the Court of Appeals of the Tenth Circuit in absolute conflict with its holding in your Petitioner's cause.

In 1947, the Court of Appeals for the Second Circuit decided *Bomar* v. *Keyes*, 162 F. 2d 136 (C. C. A. 2, 1947). The question involved was again the identical question of whether an action was commenced in time to toll a state Statute of Limitations.

The state statutes involved were those of the state of New York, set out *infra*, p. 32, which are substantially identical with the statutes of Kansas, set out, *infra*, p. 27. Judge Learned Hand, speaking for the Court, said, l. c. 140, 141:

There remains only the question of the statute of limitations. As we have said, it is not altogether clear whether the plaintiff was discharged as of October 30th or 31st, 1939; and the applicable period is six years. We leave open the questions, not only when the plaintiff was in fact discharged, but whether if the discharge was on the 30th, the complaint was filed too late on any theory. However, we now hold that it is the filing of the complaint which tolls the statute. We think that Rules 3 and 4(a) of the Rules of Civil Procedure, 28 U. S. C. A. following Section 723c, have made no longer applicable Section 17 of the New York Civil Practice Act, which fixes the beginning of the action at the date when the writ is served, or is put into the sheriff's hands for service. The Rules have with some modification adopted the practice which was apparently general in equity: *i. e.*, that the filing of the complaint, when followed by lodging the writ in the marshal's hands, will toll the statute. Therefore, we cannot see that any question arises except whether they go beyond the warrant of the statute: 'the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.' We have not to deal with a case in which the limitation is annexed as a condition to the very right of action created. The Civil Rights Act is not cast in that form; and when a right is not so conditioned, the statute of limitations is treated as going to the remedy. We are content therefore to follow the Tenth Circuit, in holding that the filing of the complaint tolls the statute. In the district courts there have been four decisions in accord—two however by the same judge—and none contra. We do not forget Judge Miller's ruling in *Yuain* v. *Carroll*, where the plaintiff himself took over the service of the summons and complaint, as permitted by Rule 4(c). We leave open the question whether in such a case any subsequent delay should not be charged to the plaintiff and count in computing the

period of limitation. Nothing of the sort appears to have happened in the case at bar."

A leading decision and one which has been much cited on the question here presented is that of *Gallagher* v. *Carroll*, 27 F. Supp. 568 (D. C. E. D. N. Y., 1943). The question involved was identical with that of the Petitioner's case, and the state statutes were again those of New York. The Court held l. c. 569, 570:

> "Since the service of this summons and complaint was not made on October 2, 1938, nor within 60 days thereafter, this decision must squarely turn upon the efficacy of Rule 3 of the Federal Rules of Civil Procedure to establish the commencement of the action.
>
> "The language of the Rule is too plain to admit of discussion or to leave any doubt that it was the purpose of the Supreme Court in reporting the Rules to Congress, and of the latter in sanctioning them, that an action should be deemed to have been commenced by the filing of the complaint; the issuance of the summons to the marshal was the required ministerial act of the Clerk; on October 2, 1938, everything had been done which the Rules contemplated, to effectuate the commencement of this action and, as that should be deemed, for the purposes of this motion, purely a question of procedure, no reason is seen for holding that the question should be determined according to the provisions of the Civil Practice Act of the State of New York rather than the Federal Rules of Civil Procedure."

And another case in point is *Krisor* v. *Watts*, 61 F. Supp. 845 (D. C. E. D. Wisc., 1945), where the Court held l. c. 845, 846:

> "Section 330.19(5) of the Wisconsin Statutes provides that no action to recover damages for an injury to a person shall be maintained unless within two years after the happening of the event a notice in

writing shall be served upon the person or corporation by whom it is claimed such damage was caused, or, if no such notice is given, then an action must be brought and a complaint actually served within two years after the happening of the event causing such damages. No notice was served or attempted in this case. Though the complaint was filed within the two year period, it was not served within that period, resulting in a failure to comply with the Wisconsin statute. The question, therefore, is whether compliance was essential.

"(1) If the action had been brought in the Wisconsin State courts, it would be barred, the requirement of the statute being a condition precedent. *Troschansky v. Milwaukee Electric Railway and Light Co.*, 110 Wis. 570, 86 N. W. 156. The Wisconsin courts have insisted upon a strict compliance. *Voss* v. *Tittel*, 219 Wis. 175, 262 N. W. 579.

"(2, 3) A civil action is commenced in a United States district court by filing a complaint. Rule 3, F. R. C. P., 28 U. S. C. A. following Sec. 723c. Such filing effects the commencement of the action for all purposes. *Reynolds* v. *Needle*, 77 U. S. App. D. C. 53, 132 F. 2d 161; *McGrier* v. *P. Ballantine and Sons*, (D. C.) 44 F. Supp. 762; *United States* v. *Spreckels*, (D. C.) 50 F. Supp. 789. The filing of a complaint commences an action within the meaning of that term in a statute of limitation. *Gallagher* v. *Carroll*, (D. C.) 27 F. Supp. 568.

"(4, 5) Pursuant to Rule 3, F. R. C. P., this action was 'commenced' within the two year period. This rule has the force of law and is as binding as a statute (*Hicks* v. *Bekins Moving & Storage Co.*, 9 Cir., 115 F. 2d 406), and cannot be abrogated or diminished by the exercise of State power through statute or otherwise. *Williams* v. *Powers*, 6 Cir., 135 F. 2d 153."

The following cases, involving diversely worded state statutes as to when an action is commenced, are in accord with the foregoing cases. In each of these it has been held that the law of the forum determines when an action is commenced so as to toll the running of the applicable Statute of Limitations. *Goldenberg* v. *Murphy*, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686; *Hackner* v. *Guaranty Trust Co.*, 117 F. 2d 95, 99, n. 1 (C. C. A. 2, 1941); *Reynolds* v. *Needle*, 77 U. S. App. (D. C.) 55, 132 F. 2d 161; *United States* v. *Spreckels*, 50 F. Supp. 789 (D. C. N. D. Cal., 1943); *McGrier* v. *P. Ballantine and Sons*, 44 F. Supp. 762 (D. C. E. D. N. Y., 1942); *Robinson* v. *Waterman S. S. Co.*, 7 F. R. D. 51 (D. C. N. J., 1947); *Collins* v. *Manville*, 170 Ill. 614, 48 N. E. 914; and *Bond* v. *Penn. R. R. Co.*, 124 Minn. 195, 144 N. W. 942. These last two cited cases are discussed *infra* under Point D. It admits of no doubt that the Court's conclusion in Petitioner's case is contrary to that reached in *Isaacks* v. *Jeffers*, *supra*, and hence to the other cases cited in the preceding discussion. But the Court of Appeals seeks to justify the result in Petitioner's case because of the decision of the United States Supreme Court in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079; and upon the further proposition that Section 60-308, Gen. Stat. Kan., 1935, *infra*, p. 27, is an integral part of the Kansas Statute of Limitations. [Sec. 60-306, Gen. Stat. Kan., 1935, *infra*, p. 27]. In so doing, it ignored and refused to apply the existing Federal law that the Federal Rules of Civil Procedure have the force and effect of Federal statutes, and may neither be abrogated nor diminished by State law, statutory or otherwise.

POINT C.

The Federal Rules of Civil Procedure have the force and effect of Federal statutes and may be neither abrogated nor diminished by State law.

The Congress of the United States, by its Enabling Act of June 19, 1934, authorized the Supreme Court of the United States to prescribe, for the District Courts, the forms of process, writs, pleadings and motions and the practice and procedure in civil actions at law; and to provide one form of civil action and procedure for both law and equity. It is expressly provided that the rules should not abridge, enlarge nor modify the substantive rights of litigants (Act of June 19, 1934, c. 651, 48 Stat. 1064, U. S. C., Title 28, Secs. 723b, 723c). The Supreme Court, on June 3, 1935, appointed an Advisory Committee to assist it in the preparation of a uniform set of Rules. The Committee's final draft was submitted to the Supreme Court in November, 1937. The proposed Rules were adopted by the Supreme Court on December 20, 1937. The Rules were reported to the Congress of the United States and the Judiciary Committees of the House and Senate held hearings on the rules, and made no changes. They became effective on September 16, 1938 (Fed. Rules Civ. Proc., 1947, Rev. Ed., 23 Marq. L. Rev. 159). Among those rules were Rule 3, which provides:

> "A civil action is commenced by filing a complaint with the court."

and Rule 4 (a) which provides:

> "Summons: Issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall is-

sue against any defendants" (28 U. S. C. foll. Sec. 723c).

These rules were prepared by the Supreme Court under the authority of the Enabling Act, *supra*, and it must be supposed that the Court considered the Rules in the light of the Enabling Act and concluded that the Rules were procedural and did not have the effect of enlarging, modifying or abridging the substantive rights of any litigant.

As required by the Enabling Act, the Attorney General reported the Rules to the Congress. Hearings on the Rules were had before the Committee on the Judiciary of the House of Representatives, and the Subcommittee of the Committee on the Judiciary of the Senate during the Third Session of the Seventy-fifth Congress. *Sibbach* v. *Wilson*, 312 U. S. 1, 15, n. 18, 61 S. Ct. 422, 85 L. Ed. 479, 486.

The Notes of the Advisory Committee called particular attention to the possibility that:

> "When a federal or state statute of limitations is pleaded as a defense, a question may arise under this rule [Rule 3] whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service" (28 U. S. C. A. foll. 723c, Rule 3, n. 4).

The Congressional Committees were apprised of this problem, yet made no effort to eliminate or modify the Rule. It must be assumed that they found neither violation of legislative policy nor violation of substantive rights of litigants.

Such considerations were given full weight in *Sibbach* v. *Wilson*, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479. The

rules there challenged were Rule 35 (providing for physical and mental examination of persons) and Rule 37 (providing for penalties for refusal to comply with order for physical or mental examination). A writ of certiorari was granted because of the importance of the question involved (309 U. S. 650, 84 L. Ed. 1001, 60 S. Ct. 809). In considering petitioner's objection to the validity of the Rules, the court said (312 U. S. 1, 15):

> "Finally, it is urged that Rules 35 and 37 work a major change of policy and that this was not intended by Congress. Apart from the fact already stated, that the policy of the states in this respect has not been uniform, it is to be noted that the authorization of a comprehensive system of court rules was a departure in policy, and that the new policy envisaged in the Enabling Act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth. The challenged rules comport with this policy. Moreover, in accordance with the Act, the rules were submitted to the Congress so that the body might examine them and veto their going into effect if contrary to the policy of the legislature.
>
> The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose. Evidently the Congress felt the rule was within the ambit of the Statute as no effort was made to eliminate it from the proposed body of rules, although this specific rule was attacked and defended before the committees of the two Houses. The Preliminary Draft of the rules called attention to the contrary practice indicated by the Botsford Case, as did the Report of the Advisory Committee and the Notes prepared by the Committee to accompany the final version of the rules. That no adverse action was taken

by Congress indicates, at least, that no transgression of legislative policy was found. We conclude that the rules under attack are within the authority granted."

Rule 3 of the Rules of Civil Procedure was approved by Congress at the same time and under identical circumstances. The pronouncements of the Supreme Court in the *Sibbach* case, *supra*, are equally applicable to the instant case. The law of the *Sibbach* case requires that the date of commencement of an action in a Federal Court is determined by the Rules of Civil Procedure and not the law of the state whose Statute of Limitations is involved.

Implicit in the decision of the *Sibbach* case is the proposition that the Rules of Civil Procedure have the force of statutes, and that state laws in conflict therewith must yield. This implication has been consistently applied by the various Courts of Appeals, including the Court of Appeals for the Tenth Circuit.

In *Alley* v. *Federal National Bank of Shawnee*, 124 F. 2d 995, 998 (C. C. A. 10, 1942), where the court was concerned with Rule 13, it said:

"If there is a conflict between the procedure provided for in the statute for the enforcement of the right created thereby and that provided for in the New Rules of Civil Procedure, the former must yield to the latter, because the Congressional authority under which the new rules were adopted expressly provides that after they become effective any laws in conflict therewith are of no further force or effect. The new rules have the force and effect of statutes. *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 61 S. Ct. 422, 427, 85 L. Ed. 479."

And in *Williams* v. *Powers*, 135 F. 2d 153, 156 (C. C. A. 6, 1943), the court said, as to Rules 46 and 51:

"The power to prescribe the practice, pleadings, forms and modes of proceedings in the courts of the

United States is lodged in the Congress and this power cannot be abrogated or diminished by the states without the consent of the law-making power of the central government. The Congress has the right to delegate to the Supreme Court and other Federal courts authority to make rules not inconsistent with the Statutes or Constitution of the United States governing the rules of practice and procedure in the Federal courts." Accord: *Hicks* v. *Bekins Moving and Storage Co.*, 115 F. 2d 406 (C. C. A. 9, 1940); *Krisor* v. *Watts*, 61 F. Supp. 845 (D. C. E. D. Wis., 1945).

In *H F G Co.* v. *Pioneer Pub. Co.*, 162 F. 2d 536, 539 (C. C. A. 7, 1942), the court said:

"Rule 1, entitled 'Scope of Rules,' provides: 'These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity. * * *.' The Enabling Act, 28 U. S. C. A., Par. 723b, empowers the Supreme Court to prescribe general rules of procedure with the limitation that they 'neither abridge, enlarge, nor modify the substantive rights of any litigant.' Furthermore, it was provided, Section 723c, that the rules should not take effect until the expiration of a designated time after they had been reported to Congress. In *Sibbach* v. *Wilson & Co., Inc.*, 312 U. S. 1, at pages 13, 14, 61 S. Ct. 422, at pages 425, 426, 85 L. Ed. 479, the court stated that the rule there under discussion 'if within the power delegated to this court, has the force of a federal statute,' and, 'Moreover, in accordance with the Act, the rules were submitted to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislature.'

"Thus, the rules having been prescribed by the Supreme Court, as rules of procedure under the limitation imposed by Congress that the substantive rights of any litigant should not be altered, it would appear that one who asserts that this rule (or any rule) deals with matters of substantive law rather than procedure

carries a heavy burden. Also we are of the view that a strong presumption exists that the Supreme Court in prescribing the rules acted within the power delegated to it by Congress, and that the court and Congress, as well as others who labored in connection therewith, thought that the rule in question was one of procedure and that its adoption would not affect the substantive rights of any litigant. Furthermore, we think that the determination as to whether a mistake has been made in this respect can more appropriately be made by the Supreme Court, which is given the power to amend."

In *Westland Oil Co.* v. *Firestone Tire and Rubber Co.*, 3 F. R. D. 55 (D. C. N. D., 1943), the court states, l. c. 56:

"The Federal Rules of Civil Procedure were drawn by an advisory committee and adopted by the Supreme Court of the United States, and thus became binding upon the Federal courts, regardless of the view of the individual judges administering them. They were not adopted without debate or opposition, indicating diversity of opinion with reference to their suitability. I am inclined to view that the Rules mean what they say and that it is the duty of the courts in administering them to give full expression to the clear meaning of the words used * * *."

Petitioner believes that the inescapable conclusion is that the Supreme Court and the Congress of the United States, both fully aware of the very problem now presented, declared the Federal Rules of Civil Procedure to be the sole law for the determination of the date of commencement of an action in the Federal Courts. Equally inescapabl is the conclusion that the Rules now occupy the position of statutory law and, barring a successful attack on their Constitutionality, must be applied in the Federal Courts.

Section 60-308 of General Statutes for Kansas, 1935, set out *infra*, p. 27, is in conflict with Rule 3 of the Federal Rules

of Civil Procedure. It must not be applied to an action in Federal Court. The decision of the Court of Appeals is improper in that it abrogates the statute law of the United States, contravenes the decision of the United States Supreme Court in *Sibbach v. Wilson and Co., supra*, and is in conflict with its own prior decisions and the decisions of other Courts of Appeals.

POINT D.

The Kansas statute as to commencement of actions is not an integral part of the Kansas Statute of Limitations.

Implicit in the decision of the learned Court of Appeals is the thought that Section 60-308, Gen. Stat. Kan., 1935, is an integral part of the Kansas Statute of Limitations, which is sub-paragraph Three of Section 60-306, Gen. Stat. Kan., 1935.

The Kansas statutes read as follows:

"General Statutes of Kansas, 1935

"Sec. 60-301. How Action Commenced. A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon."

"Sec. 60-306. Civil Actions Other Than for Recovery of Real Property. Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued and not afterwards; * * *.

"Third. Within two years. * * * an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; * * *."

"Sec. 60-308. When Action Deemed Commenced. An action shall be deemed commenced within the meaning of this article, as to each defendant, at the date of the summons which is served on him, or on a co-

> defendant who is a joint contractor, or otherwise united in interest with him, * * * An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days."

Petitioner has been unable to find, nor was there cited by either respondent or the Court of Appeals for the Tenth Circuit any case in which the above Kansas statutes as to commencement and limitation of actions were construed in reference to the problem here presented.

The proper construction must, therefore, be determined by (1) the interpretation of the Kansas Supreme Court as inferred from its opinions in cases involving other problems; and (2) the interpretation given to substantially similar statutes of other states in instances in which the problem here presented has arisen.

(1) The interpretation of the Kansas statutes by the Kansas Supreme Court.

It is quite true that the early Kansas case of *Dunlap* v. *McFarland*, 25 Kan. 488, ... Pac. ....., said of the section now numbered 60-308: "The section has application only to the statute of limitations." This statement unconnected with the facts present in that case might create an erroneous impression. In that case the defendant in a suit brought by attachment argued that the attachment was invalid because the summons had not been served upon the defendant. Obviously, the sustaining of such a contention would have made virtually impossible the bringing of a suit by attachment against one planning to conceal or remove his property or person.

Bannister v. *Carroll*, 43 Kan. 64, 22 Pac. 1012, enlarged somewhat upon this one sentence in a fact situation identical with that of the *Dunlap* case, *supra*. The Court there said that if the question is when the tolling of the statute began then it is not until the date that Section 60-308 is complied with, but where the propriety of attachment is concerned:

> "We think the proper construction to be given to Section 57 [now 60-301] of the Code is that when a petition is filed and a summons served, or its first publication is made within 60 days such service or first publication relates back to the time of filing of the petition and praecipe and other necessary papers, and by such relation the suit is to be deemed commenced at the date of their filing." Accord: *Vann* v. *Missouri, K. & T. R. Co.*, 110 Kan. 799, 205 Pac. 607.

And in *Allis-Chalmers Mfg. Co.* v. *Lewelling*, 141 Kan. 350, 41 Pac. 2d 1032, it was said:

> "This court has held in cases that did not involve the statute of limitations that where the publication was made after the filing of the petition it related back to the time of the filing of the petition, provided it was made within 60 days of the filing of the petition. See *Bannister* v. *Carroll*, 43 Kan. 64, 22 Pac. 1102."

In the case of *Commercial National Bank* v. *Tucker*, 123 Kan. 214, 254 Pac. 1034, the Kansas Supreme Court said:

> "For the purpose of computing the Statute of Limitations an action is deemed commenced, 'as to each defendant, at the date of the summons which is served on him.' R. S. 60-308. But this section of the statute contemplates that a petition has been filed stating, or at least attempting to state a cause of action against such defendant, as provided by R. S. 60-301. Even

if a petition had been filed before summons was issued but such petition stated no cause of action against the defendant in question, and at some time later the petition was amended so as to state a cause of action against such defendant, the date of filing of such amended petition would be the date of the commencement of the action against such defendant. *Railway Co.* v. *Bagley*, 65 Kan. 188, 69 Pac. 189, *Taylor* v. *Swift & Co.*, 114 Kan. 431, 219 Pac. 516."

As will be observed from the above cases, Sections 60-301 and 60-308 are not considered separately, but are related. For all purposes, the person commencing the action must comply with the requirements of both sections. He must file a petition, cause a summons to be issued, and make service or obtain publication within 60 days from the filing of the petition. A failure to comply with both sections means that, for all purposes, no action has been commenced.

When both sections have been complied with, the action is commenced. As to attachment, *lis pendens*, etc., the commencement is dated back to the date of the filing of the petition and issuance of the summons. But as to the Statute of Limitations, this fiction of relation back is not used.

The subsequent explanation by the Kansas Supreme Court of its statement in *Dunlap* v. *McFarland*, *supra*, that: "The section [Sec. 60-308] has application only to the Statute of Limitations," leaves no doubt that Sections 60-301 and 60-308 of the Gen. Stat. Kan., 1935, are related sections and together constitute the mechanical steps for commencing an action under the laws of Kansas as determined by its Supreme Court.

The learned Court of Appeals for the Tenth Circuit has held that "the manner and method to be followed in

commencing actions is procedural and is controlled by the laws of the forum in which the action is filed," and has further noted that Sec. 60-301 is procedural. This being so, the law of the State of Kansas requires that the related Sec. 60-308 also be classed as procedural, and not as substantive nor as an integral part of the Kansas Statute of Limitations.

The fact that there are two sections of the Kansas statutes as to when an action is commenced lends no weight to the theory that one of them, *i. e.*, Sec. 60-308, is an integral part of the Kansas Statute of Limitations. The purpose of such section is to assure that the Statute of Limitations will not be tolled unless due diligence is used in getting service. Each forum has the right to say what is due diligence. The Federal Rules of Civil Procedure by Rule 4 (a) which requires that a summons be forthwith issued and delivered to the proper person for service has assured the use of due diligence. And it has been consequently held that both Sections 3 and 4 (a) must be complied with before an action is deemed commenced in Federal Courts so as to toll a statute of limitations. *Bomar* v. *Keyes*, 162 F. 2d 136 (C. C. A. 2, 1947), *Yudin* v. *Carroll*, 57 F. Supp. 793 (D. C. Ark., 1944). Others leave it to the flexible common law requirement of due diligence and a finding of lack of due diligence means that the statute continued to run even though the petition or complaint had been filed. Still others fix a definite time limit, *e. g.*, 60 days as was at one time proposed for the Federal Rules. If that limit is exceeded then the statute was not tolled during the 60 days. Others, such as New York, Minnesota, Oklahoma and Kansas assure due diligence by holding that the statute is not tolled until service of summons. This is merely an alternative method of promoting due diligence and re-

quiring good faith in order that the statute be tolled. There is nothing within the Kansas statutes as to the commencement of an action which causes Section 60-308 to become an integral part of the Kansas Statute of Limitations and the Supreme Court of the State of Kansas has never so held.

(2) The interpretation of similar statutes of other states.

The statutes of the State of New York are practically identical with the Kansas statutes, and it is petitioner's information and belief that the New York statutes were the source of the Kansas statute here involved. The New York statutes are to be found in Article 2 of the New York Civil Practice Act. These statutes are as follows:

"ARTICLE 2—CIVIL PRACTICE ACT.

LIMITATIONS OF TIME.

GENERAL PROVISIONS.

"Section 16. When Action Deemed to Be Commenced. An action is commenced against a defendant within the meaning of any provision of this act which limits the time for commencing an action, when the summons is served on him or on a co-defendant who is a joint contractor or otherwise united in interest with him.

"Section 17. Attempt to Commence Action in Court of Record. An attempt to commence an action in a court of record is equivalent to the commencement thereof against each defendant, within the meaning of each provision of this act which limits the time for commencing an action, when the summons is delivered, with the intent that it shall be actually served, to the sheriff * * * of the county in which that defendant, or one of two co-defendants who are joint contractors or otherwise united in interest with him, resides or last resided; * * * But in order to entitle a plaintiff to the benefit of this section the de-

livery of the summons to an officer must be followed within sixty days after the expiration of the time limited for the actual commencement of the action by personal service thereof upon the defendant sought to be charged, or by the first publication of the summons, as against that defendant, pursuant to an order for service upon him in that manner. * * *

"Section 49. Actions to Be Commenced Within Three Years. The following actions must be commenced within three years after the cause of action has accrued: * * *

"6. An action to recover damages for an injury to property, or a personal injury resulting from negligence."

In *Goldenberg* v. *Murphy*, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686, the Supreme Court of the United States considered the above New York statutes. That was a suit to recover back duties on imports paid under protest. Such suit had to be brought within 90 days after the decision of the Secretary imposing the tax. This decision was entered on May 28, 1872. The 90 days expired on August 26. Service was not had until after the expiration of the period; but since the summons was delivered to the sheriff on August 26, the action was commenced under New York law. It was held "the laws of that State [New York] must determine when it was brought, and as that is prescribed by statute, we have no need of inquiry as to the practice in other states, or the rules of the common law." Thus, at an early date the Supreme Court of the United States classified the above New York statutes as procedural.

In *Bomar* v. *Keyes*, 162 F. 2d 136 (C. C. A. 2, 1947), the precise question here presented was involved. The Court said, l. c. 140:

"There remains only the question of the statute of limitations. * * * We now hold that it is the filing of the complaint which tolls the statutes. We think that Rules 3 and 4(a) of the Rules of Civil Procedure, 28 U. S. C. A., following 723c, have made no longer applicable Section 17 of the New York Civil Practice Act, which fixes the beginning of the action at the date when the writ is served, or, put into the sheriff's hands for service. * * * We have not to deal with a case in which the limitation is annexed as a condition to the very right of action created."

Gallagher v. *Carroll*, 27 F. Supp. 568 (D. C. E. D. N. Y., 1939), involved the same question and the same statutes. As in *Bomar* v. *Keyes*, the Court left no doubt that they considered the New York statutes as to commencement of an action procedural and not an integral part of the New York Statute of Limitations. They held that the date of the commencement of the action was determined by the Federal Rules of Civil Procedure, and continued, l. c. 570:

"*Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, was decided on April 25, 1938, after the Rules had been reported to Congress and while the case is cited by the defendant it is not believed to affect the decision of this motion, since it deals with the requirement resting upon the Federal Court to follow the state decisions in questions of substantive law."

And in *Collins* v. *Manville*, 170 Ill. 614, 617, 48 N. E. 914, the Court found that the New York statutes were procedural and not substantive, saying:

"It is argued that although the suit was commenced in time within this State, and when it might have been brought in New York, yet, because the New York Code provides for an abatement of the action on account of a subsequent event which prevents the plaintiff from

maintaining or continuing it, the same rule of procedure must be adopted here. To this proposition we cannot assent. The form and mode of procedure must be according to the rules of this State. If it were a question of when an action had been commenced in New York, the laws of that State would govern, but the question here is when was the action commenced in this State and as to that our laws govern. *The question is purely one of remedy and procedure governed by the law of the forum.*"

Equally enlightening is the interpretation by the Supreme Court of Minnesota of the extremely similar Minnesota statute. At the time *Bond* v. *Penn. R. R. Co.*, 124 Minn. 195, 144 N. W. 942, was decided, that statute read as follows:

"Revised Laws of Minnesota, 1905,

Chapter 77.

Limitation of Actions.

4081. For the purposes of this subdivision, an action shall be considered as begun against each defendant when the summons is served on him, or on a co-defendant, who is a joint contractor or otherwise united in interest with him, or is delivered to the proper officer for such service, but, as against any defendant not served within the period of limitation, such delivery shall be ineffectual unless within 60 days thereafter the summons be actually served on him or the first publication thereof be made."

This section of the Minnesota statutes was classified as procedural by the Supreme Court of Minnesota in *Bond* v. *Penn. R. R. Co.*, *supra*. A plaintiff commenced an action in Minnesota. The cause of action arose under the wrongful death statute of Pennsylvania and under the Statute of Limitations of Pennsylvania had to be brought within one

year from the date of the death. The Court held (144 N. W. 942, 943):

> "An action brought in this State to recover damages for the death of a person caused by a wrongful act committed in another State is based upon the statute of the State in which the cause of action arose; and the time within which such action may be brought is the time prescribed by such statute and not the time prescribed by our own statutes. But the means by which our courts acquire jurisdiction and the time at which the action is deemed commenced, and all other matters relating to the procedure and to the remedy are determined and governed exclusively by our own statutes."

The Court's attention is respectfully invited to the remarkable similarity between the sections of the Kansas statutes here involved and those of Minnesota and New York. In the absence of direct decisions as to the nature of the Kansas statutes the decisions of courts construing similar statutes of other states represent sound and forceful precedent for a ruling that the Kansas statutes are procedural and are not an integral part of the Statute of Limitations.

Your petitioner is aware of only one instance where it has been suggested that the portion of a state statute dealing with the commencement of an action was an integral part of the state statute of Limitations.

In the case of *Krisor* v. *Watts*, 61 F. Supp. 845 (D. C. E. D. Wis., 1945), discussed *supra* under Point B, there was involved a peculiarly worded Wisconsin statute combining the Statute of Limitations and commencement of actions. The court nevertheless held that the Federal Rules of Civil Procedure determined when an action was commenced in a Federal District Court.

The result of this case has been criticized (*e. g.* Ilsen, "Recent Developments In Federal Practice And Procedure," published in Federal Rules of Civil Procedure, West Publishing Co., 1947 Rev. Ed.) because of the possibility that the requirement of notice or service was an integral part of the Wisconsin Statute of Limitations.

Assuming the propriety of such criticism of the *Krisor* case, the statute there involved was so absolutely different from the Kansas statute that no basis is afforded for the result in Petitioner's case.

The Wisconsin statute referred to read as follows:

"Wisconsin Statutes, 1943.

330.19. Within six years; foreign limitation; notice of injury. Within six years:

1. * * *

2. * * *

3. * * *

4. * * *

5. An action to recover damages for an injury to property, real or personal, or for an injury to the person, character or rights of another, not arising on contract, except in case where a different period is expressly prescribed. But no action to recover damages for injuries to the person, received without this state, shall be brought in any court in this state when such action shall be barred by any statute of limitations of actions of the state or country in which such injury was received unless the person so injured shall, at the time of such injury, have been a resident of this state. *No action to recover damages for an injury to the person shall be maintained unless, within two years after the happening of the event causing such damages, notice in writing, signed by the party damaged, his agent or attorney, shall be served upon the person or corpora-*

tion by whom it is claimed such damage was caused, stating the time and place where such damage occurred, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made and that satisfaction thereof is claimed of such person or corporation. Such notice shall be given in the manner required for the service of summons in courts of record. No such notice shall be deemed insufficient or invalid solely because of any inaccuracy or failure therein in stating the description of the injuries, the manner in which they were received or the grounds on which the claim is made, provided it shall appear that there was no intention on the part of the person giving the notice to mislead the other party and that such party was not in fact misled thereby; provided, that the provision herein, requiring notice of two years shall not apply to any event causing damage which happened before the passage and publication of this act. When an action shall be brought and a complaint actually served within two years after the happening of the event causing such damages, the notice herein provided for need not be served" (Italics added).

It is quite obvious that the statute there involved is in no sense comparable to the Kansas statute as to commencement of actions. Thus, even if we assume that the case of *Krisor* v. *Watts, supra,* was improperly decided, it affords no basis for the decision in Petitioner's case.

It is, of course, perfectly competent for the United States Supreme Court to decide the nature of the Kansas statutes as to commencement of actions. As stated in *Meredith* v. *City of Winter Harbor*, 320 U. S. 228, 64 S. Ct. 7, 88 L. Ed. 9, the Supreme Court of the United States "has not hesitated to decide questions of state law when necessary for the disposition of a case [diversity] brought to it for decision although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain."

It is respectfully submitted that in classing Sec. 60-308, Gen. Stat. Kan., 1935, as an integral part of the Kansas Statute of Limitations the Court of Appeals has erred because such is not the law of the State of Kansas, as gathered from the decisions of the Kansas Supreme Court and the interpretation given comparable statutes of other states.

POINT E.

The decision unwarrantedly and improperly extends the United States Supreme Court decision of Guaranty Trust Company v. York, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079.

The learned Court of Appeals, in reaching its decision, relied heavily upon dictum in the case of *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (R. 47, 48):

> "While there has been much debate and much disagreement among law writers as to whether statutes of limitation are procedural or substantive, the policy of the Federal law as laid down in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, is that the outcome of litigation in diversity cases in the Federal Courts should be substantially the same as if the case had been filed in the state court. Thus, the Court says:
>
> 'The nub of the policy that underlies *Erie R. Co.* v. *Tompkins*, is that for the same transaction, the accident of a suit by a non-resident litigant in a Federal Court instead of a State Court a block away should not lead to a substantially different result.'"

Accepting this statement as the law absolute in all conceivable cases, the Court reaches the conclusion that since the action could not be brought in the state courts, it should not have been entertained by the Federal Court.

Plaintiff believes that this conclusion is totally unwarranted and the unfortunate result of the consideration of the above dictum out of all context with the situation to which it had reference.

In the *Guaranty Trust* case the contention of defendant as stated by the Court of Appeals, *Guaranty Trust Co. v. York*, 143 F. 2d 503, 521 (C. C. A. 2, 1944), was that:

> "* * * under New York law, and therefore in a Federal Court sitting in New York, a suit by a beneficiary against a trustee for breach of trust, unless it is the equivalent of an action for deceit, is barred at least after 10 years regardless of the fact that, due to the Trustee's inequitable conduct, the beneficiary was ignorant of the cause of action until after the fixed statutory period."

The breach of trust referred to occurred in 1931 and no attempt was made to commence this action until January 22, 1942, more than 10 years after the cause of action had accrued. Undoubtedly, if this had been an action at law the suit would have been barred. However, plaintiff contended that the law of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, did not apply to suits in equity.

In the *Guaranty Trust* case the Supreme Court of the United States rejected this contention, saying:

> "To make an exception to Erie R. Co. v. Tompkins on the equity side of a Federal Court is to reject the considerations of policy which after long travail led to that decision. Judge Augustus N. Hand thus summarized below the fatal objection to such inroad upon Erie R. Co. v. Tompkins:
>
> 'In my opinion it would be a mischievous practice to disregard state statutes of limitation whenever Federal Courts think that the result of adopting them

may be inequitable. Such procedure would promote the choice of United States rather than of state courts in order to take the advantage of different laws. The main foundation for the criticism of *Swift* v. *Tyson* was that a litigant in cases where Federal jurisdiction is based only on diverse citizenship may obtain a more favorable decision by suing in the United States courts.'"

Petitioner has no quarrel with the classification of state Statutes of Limitation as substantive law. Nor does he find any fault with the holding in the *Guaranty Trust* case, but Petitioner most emphatically denies that the *Guaranty Trust* case compels or even allows a conclusion such as the one reached by the Court of Appeals for the 10th Circuit.

As stated in Ilsen's "Recent Developments In Federal Practice" (Federal Rules of Civil Procedure, West Publishing Co., 47 Rev. Ed., p. 320):

> "Nothing, however, in the opinion in *Guaranty Trust Co. of New York* v. *York* should lead one to conclude that a Federal Court would have to adopt a state rule that an action is only commenced when service is actually made on the defendant. The only question there involved was whether a Federal Court had to follow the state statute of limitation and not the mechanical method of commencing an action."

It is obvious that the courts of our Federal judicial system have never felt that their guide in determining the application of Federal Rules of Civil Procedure in diversity cases should be the result which would have been reached had the action been in a state court a block away.

In *Bomar* v. *Keyes*, 162 F. 2d 136 (C. C. A. 2, 1947), discussed *supra*, Point B, the court made it quite clear that it was immaterial what the decision of courts of the state

of New York would have been, since the mode of commencing an action in Federal courts is determined solely by the Federal Rules of Civil Procedure. And this decision was rendered after the Supreme Court had decided the *Guaranty Trust* case, *supra*.

In accord are *Sibbach* v. *Wilson*, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479; *Hackner* v. *Guaranty Trust Co.*, 179 F. 2d 95 (C. C. A. 2, 1941); *Reynolds* v. *Needle*, 132 F. 2d 161 (U. S. App. D. C.); and *Krisor* v. *Watts*, 61 F. Supp. 845 (D. C. E. D. Wisc., 1945). The above citations do not purport to be exhaustive, but rather are representative of an unbroken line of decisions, unimpaired by the *Guaranty Trust* dictum.

Petitioner believes that the attempt of the learned Court of Appeals to apply the dictum of the *Guaranty Trust* case to the Federal Rules of Civil Procedure is highly improper. If this position is adverted to, it is difficult to imagine how any of the rules can have effect in diversity cases when they are in conflict with the procedure of the various state courts. For every rule of procedure must necessarily, at one time or another, result in a different decision in the Federal Court than in the state court across the street. The thing which the learned Court of Appeals has overlooked is simply this: though a Statute of Limitations be substantive, it does not follow that the statutes providing the mechanical means for commencing an action in order to toll those substantive Statutes of Limitation are also substantive law.

It is therefore respectfully submitted that the Court of Appeals for the Tenth Circuit has grossly misinterpreted the case of *Guaranty Trust Company* v. *York* and has applied it to a situation to which it was never meant to be applied. Through the application of the *Guaranty Trust* dictum made by the Court of Appeals, the Federal Rules

of Civil Procedure have been rendered nugatory. In practical effect the decision has returned us to the very Conformity Act (28 U. S. C. A., Sec. 724) whose evils were thought to be eliminated.

CONCLUSION.

It is respectfully suggested that the Court of Appeals for the Tenth Circuit has erroneously decided an important question of Federal law not heretofore decided by this Court; and that said decision transgresses the decisions of this Court, the decisions of other Courts of Appeals, and its own prior decisions to an extent calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari, and thereafter reviewing and reversing the said decision.

DANIEL L. BRENNER,
Counsel for Petitioner.

ROACH, BRENNER & WIMMELL,
of Kansas City, Missouri,
Of Counsel.